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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 MICHAEL KANE; et al.,

4 Plaintiffs,

5 v.

21 Civ. 7863
(Part I)

6 BILL de BLASIO, in his
7 official capacity as Mayor of
the City of New York; et al.,

8 Defendants.

TRO Hearing

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9 New York, N.Y.
10 October 5, 2021
10:35 a.m.

11 Before:

12 HON. MARY KAY VYSKOCIL,

13 District Judge

14 APPEARANCES

15 GIBSON LAW FIRM, PLLC
Attorneys for Plaintiffs
16 BY: SUJATA S. GIBSON, ESQ.

17 NEW YORK CITY LAW DEPARTMENT
OFFICE OF THE CORPORATION COUNSEL
18 Attorneys for Defendants
19 BY: LORA MINICUCCI, ESQ.
Assistant Corporation Counsel

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(Case called)

THE DEPUTY CLERK: Good morning, your Honor.

THE COURT: Good morning, Ms. Dempsey.

Please be seated, everyone.

THE DEPUTY CLERK: Counsel, starting with plaintiffs, please state your name for the record.

MS. GIBSON: Sujata Gibson, your Honor.

THE COURT: Good morning, Ms. Gibson.

MS. MINICUCCI: Lora Minicucci for the city of New York and the DOE.

THE COURT: All right. Good morning, Ms. Minicucci.

Any other appearances this morning?

All right. So just a couple of preliminary announcements before we get going:

First, I apologize to people for the delay in getting started this morning, but the delay was occasioned by the fact, ironically, of restrictions as a result of COVID-19. We're here to talk about the city's vaccine mandate for teachers and other employees of the Department of Education. I would just remind people that the court does have rules with respect to social distancing and masking. Anybody not following those rules will be asked to leave the courtroom.

Second, it is illegal to rebroadcast or publish live or record any portion of court hearings. If anybody does so, it will be reported to the Marshals, who will take appropriate

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1 actions.

2 Now this case is pending in front of Judge Caproni,
3 who has scheduled a hearing on the motion for a preliminary
4 injunction for next Tuesday at 11 a.m. in her courtroom, which
5 is Courtroom 443 of the Thurgood Marshall Courthouse. She will
6 allow the parties the opportunity to file any additional
7 materials. Any supplemental materials that the plaintiffs wish
8 to file will be due on Thursday, October 7th, at 5 p.m., and
9 any supplemental materials by the city or the other defendants
10 will be due Friday by 5 p.m.

11 We're here today on plaintiffs' application made on an
12 *ex parte* basis for an emergency temporary restraining order
13 pending the hearing next week. Please bear in mind, I have
14 carefully read all of the materials that were submitted to the
15 Court yesterday. The Court received from the plaintiffs 12
16 affidavits, one from each of the nine plaintiffs, one from
17 counsel, and an affidavit from two medical professionals who
18 opine on matters that, in the Court's view, really have little
19 to nothing to do with the issues framed by the motion for
20 preliminary injunction.

21 Plaintiffs also filed a memorandum of law, and they
22 did that on an *ex parte* basis, no notice given in advance to
23 the defendants. The Court entered an order directing the
24 defendants to serve any opposition by 8 p.m. last night, which
25 they did, and I have carefully reviewed that opposition as

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1 well.

2 So I will hear briefly from the parties, but please
3 bear in mind that I have very carefully reviewed everything
4 that has been filed.

5 All right. Who would like to be heard for the
6 plaintiffs?

7 MS. GIBSON: I'm the only attorney here, your Honor.

8 THE COURT: Thank you.

9 MS. GIBSON: Thank you. Do you want me to go here or
10 there?

11 THE COURT: Whichever is better for you is fine for
12 me. Is there a microphone there?

13 MS. GIBSON: There is, your Honor.

14 THE COURT: Great. Thank you.

15 MS. GIBSON: So this case essentially brings us a few
16 different questions. The threshold question is: Is a
17 religious exemption required of these vaccine mandates? This
18 case is not the other cases cited by defendants, which are
19 about completely different issues. They're about whether, you
20 know, broader rights of bodily autonomy allow any vaccine at
21 any time; whether, you know, the right to work means no one can
22 ever tell you you have to get vaccinated. That is not before
23 this Court. What is before this Court is whether a religious
24 exemption is required and whether this particular approach to
25 it violates the law. So the Second Circuit injunction does

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1 control on that issue of whether religious exemption is
2 required. They just passed it last week, and they noted that
3 they did uphold -- citing *Roman Catholic Diocese*, they did
4 uphold the right, at least through a TRO, for this preliminary
5 injunctive relief for health care workers to have a religious
6 exemption.

7 THE COURT: All right. So a couple of things.

8 First of all, that case, that was, as you say, a TRO,
9 and the case is going to be argued next week, I believe,
10 correct?

11 MS. GIBSON: I believe the 15th, I think.

12 THE COURT: Okay. So there's not a final,
13 on-the-merits ruling from the Second Circuit.

14 MS. GIBSON: Right, your Honor, but they did
15 indicate --

16 THE COURT: Hold on.

17 MS. GIBSON: Sorry.

18 THE COURT: There is now an opportunity in this case
19 for the teachers and other employees of the DOE to apply for
20 medical exemption or a religious exemption. And by the way, in
21 your comments, you've referenced only the religious exemption.
22 Are you dropping your medical exemption argument?

23 MS. GIBSON: No, your Honor. Just in the interest of
24 time, I'm focusing on that. But yes, there is.

25 So that brings us to the second point, which is

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1 whether the religious exemption offered through the arbitration
2 award is constitutionally sufficient. The plaintiffs have
3 argued in great detail --

4 THE COURT: Hold on. You've just hit on a key point
5 that neither side has briefed here, which is that the
6 exemptions were put in place as a result of an arbitration
7 award, which is the product of the collective bargaining
8 process. It was not part of the original mandate, correct?

9 MS. GIBSON: Correct, and that's why I say facially
10 the law is unconstitutional. As it's applied through this
11 award, though -- which not all of the members are members of
12 UFT -- but as it's being applied, it is unconstitutional, quite
13 blatantly. What it does --

14 THE COURT: All right. But the point that you haven't
15 briefed -- and I know you want to launch into the argument, but
16 that argument that you want to launch into, you've fully
17 briefed in your papers. What you haven't briefed in your
18 papers is whether an exemption, which is put in place as a
19 result of a collective bargaining process, is government action
20 for purposes of asserting a constitutional claim; and second,
21 whether, because there is the collective bargaining process,
22 the individual teachers, as opposed to the union, have standing
23 to even assert those violations. And that hasn't been briefed
24 at all by either side, correct?

25 MS. GIBSON: No, it hasn't, your Honor. I would be

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1 happy to put that in my supplemental materials. But one point
2 I'm going to point out now is, we're attacking the whole
3 mandate facially, so whatever happens -- whether this
4 arbitration agreement was allowed to be made or not, you
5 know -- it's not an agreement -- sorry -- it's an award. So it
6 was made not as a result of agreement but rather it was an
7 award through arbitration, so the question is can that be
8 challenged -- can arbitration awards be challenged on
9 constitutional grounds. My clients did not agree to this
10 arbitration award. They did not agree to waive their rights
11 not to be discriminated against facially when they hold
12 religious beliefs that are in the minority or are, you know,
13 personally held religious beliefs, which has been very clearly
14 established as unlawful. You cannot say that only religious
15 beliefs that the Pope sanctions are okay religious beliefs. It
16 is just the most clear-cut Establishment Clause violation I've
17 ever seen. But so the question of whether the arbitration
18 award changes that I think is addressed in the fact that we're
19 challenging this both facially and as applied. So --

20 THE COURT: I don't think that's a fair read of your
21 papers. Your papers really challenge the application of the
22 exemption, and as you say, the fact that apparently, in some of
23 the appeals the arbitrator has said, apparently, or has taken
24 the position, that if the recognized leader of a particular
25 faith says there is no religious basis for objecting, the

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1 exemption won't be granted, and, apparently, takes the position
2 that one must belong to some kind of an organized religion.

3 MS. GIBSON: Actually, the award itself takes that
4 position. It says very clearly -- and many people did not even
5 apply because they were precluded from even applying if they
6 didn't provide a clergy note or belong to a religion.
7 Basically the mayor defined it as, if they weren't Christian
8 Scientists or Jehovah Witnesses, he very explicitly said he
9 would not grant it, and the arbitration award itself references
10 you have to belong to a bona fide --

11 THE COURT: Counsel, somebody who doesn't bother to
12 apply and avail themselves of the process -- and, frankly, this
13 is the other problem that the Court sees with your application
14 for a TRO and your failure to make out the elements, is that
15 some of these plaintiffs didn't even file, or one of them
16 didn't even file an application; some of them, their appeal is
17 still pending; and some of them, as you say, didn't appeal the
18 original denial. Now there are one or two who have gone
19 through the whole appellate process.

20 MS. GIBSON: I'm sorry, your Honor. I just want to
21 clarify something for the record. The declarations were not
22 all from plaintiffs. Some of those people were just other
23 affected people. We are intending perhaps some changes in the
24 class action. Right now --

25 THE COURT: It's not a class action right now.

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1 MS. GIBSON: But all the nine defendants did apply for
2 religious exemptions.

3 THE COURT: Plaintiffs.

4 MS. GIBSON: Plaintiffs. Sorry. And they did file to
5 appeal it, and half of them have been --

6 THE COURT: But that's not in the record then. If
7 you're telling me the affidavits that you gave me are not all
8 the plaintiffs, your representations about the state of the
9 record or the state of the plaintiffs' appeals is not part of
10 the record then.

11 MS. GIBSON: Well, your Honor, this has been happening
12 very fast. Even since Monday, changes -- when we filed
13 yesterday, changes have happened. This was all applied over
14 the weekend. It was a very fast --

15 THE COURT: Yes, I know you applied over the weekend,
16 after the mandate, as extended, went into effect, on a mandate
17 that was announced at the end of August.

18 MS. GIBSON: Right. And decisions hadn't been made
19 yet on everybody. But what I am saying is that defendants did
20 put in their materials, that are sworn, that some of our
21 plaintiffs have been denied, and they also put in that some are
22 pending, and in our record it shows that not only are some
23 pending but they were originally denied and then changed to
24 pending in anticipation of this litigation. So I do find that
25 facts concerning -- and I think I -- it's important to point it

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1 out, but they did all apply, as they all said in their
2 statements that they applied, and they all said in their
3 statements that they appealed. They didn't have a decision at
4 the time that we -- they didn't all have a decision at the time
5 that we turned in our emergency motion, but they did all apply.
6 So the --

7 THE COURT: Counsel, let me just ask you, because I
8 know you want to argue the constitutional issue, but frankly,
9 I'm not prepared to hear that today because I think there are
10 some other threshold things that we need to talk about first.
11 Specifically, I would like you to address the question of why
12 these plaintiffs cannot be compensated with money damages if
13 they were to ultimately prevail on their constitutional claim.
14 So you're here seeking preliminary injunctive relief and, in
15 the interim, from me, a temporary restraining order, so in
16 order to prevail, you have to show irreparable harm.

17 MS. GIBSON: Well --

18 THE COURT: Let me finish. The effect of the mandate
19 is not that the teachers are fired, as is the case in the
20 health care workers case that's up in the Second Circuit and
21 going to be heard in two weeks, but rather that they're placed
22 on leave with all of their benefits, and they can then pursue
23 their constitutional challenge in the case that you have filed,
24 that you filed in the third week in September, and if they
25 ultimately prevail, why can they not be fully compensated by

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1 money damages? How can you show irreparable harm?

2 MS. GIBSON: Your Honor, to correct the record, they
3 are not -- several of them have been fired; effective
4 yesterday, they were fired, and placed on unpaid leave, where
5 you can't get another job and you can't -- and you get health
6 insurance. It is not sufficient. But I would say to your
7 point --

8 THE COURT: Counsel, you're playing a game of
9 semantics. What the remedy is for failure to comply with the
10 mandate is, you're placed on administrative leave with
11 benefits. Now you're calling that firing. I understand there
12 are certainly implications of that, but that's different than
13 the health care workers case.

14 MS. GIBSON: Your Honor, I would not agree that that
15 is the consequence of the mandate. You have to make a separate
16 agreement to apply for those, the status of being on leave with
17 benefits, and you have to waive a whole lot of rights in order
18 to do that, including the right to get another job or the right
19 to a lot of other things. So people are scrambling, they
20 haven't decided --

21 THE COURT: But counsel, those are all the issues that
22 will be litigated in the case that you have brought. We are
23 here on your application for emergency temporary relief.

24 MS. GIBSON: Yes, and I will speak to that.

25 So the Supreme Court has -- multiple courts have

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1 stated that is a deprivation of constitutional rights. Being
2 discriminated against openly and placed on unpaid leave or
3 fired is certainly discrimination, and that alone, the ongoing
4 discrimination against constitutional rights based on religious
5 views that are in the minority or heretical -- as the
6 dictionary definition of heretical is this UFT award basically
7 says, if you're a heretic, you don't get the same treatment as
8 everyone else -- that alone is enough. That is irreparable
9 harm, and that has been affirmed by *Jolly v. Coughlin*, that has
10 been affirmed by *Roman Catholic Diocese*, it was affirmed in
11 *Agudath v. Cuomo*, it has been affirmed in *Tandon v. Newsom*.
12 It's been affirmed in multiple contexts.

13 THE COURT: There are also cases that go on to say, if
14 you haven't shown a likelihood of success on the merits, the
15 presumption of irreparable harm may not attach.

16 MS. GIBSON: Sure. The most important thing in this
17 case is likelihood of success on the merits.

18 THE COURT: Correct.

19 MS. GIBSON: Because if the -- there are multiple
20 cases that say, in a constitutional challenge, if you show
21 likelihood of success on the merits, you are presumed to have
22 met the irreparable harm.

23 THE COURT: Right.

24 MS. GIBSON: Because, you know -- so, and that doesn't
25 mean you have to prove that you definitely will prevail but

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1 that you're likely to prevail, and so that is why it's so
2 important to talk about the Constitution today, because the
3 Second Circuit decision is controlling, and that it says, you
4 know -- recognizes that they're likely to succeed. We're not
5 saying that that means they're definitely --

6 THE COURT: What Second Circuit decision recognizes
7 that these plaintiffs on this mandate are likely to succeed?

8 MS. GIBSON: That the concept of religious exemption
9 is likely to succeed, in *We The People* v. --

10 THE COURT: There is a religious exemption. You're
11 just quarreling or taking issue with the scope or how it's
12 applied.

13 MS. GIBSON: Sure. I would be happy to talk about
14 that. So that is the *Sherr* case, and there is a whole host of
15 other Supreme -- of Supreme Court cases that say that any kind
16 of hostility -- there's the *Masterpiece Cake* case and many
17 others, like *Lukumi* and *Trinity Lutheran* and *Roman Catholic*
18 *Diocese* and *Agudath* -- well, *Agudath* is the Second Circuit --
19 and *Tandon v. Newsom* and a host of other cases that have hit
20 home the point that any kind of discrimination or any kind of
21 negative talk about certain religious beliefs versus others or
22 any kind of hint that there may be a, you know, impermissible
23 lack of neutrality, either in reality or as perceived from
24 statements from public officials that are passing these things
25 makes it very likely that the provision will not succeed is

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1 going to be very strictly scrutinized, even if it's neutral law
2 of general applicability, and here we actually have --

3 THE COURT: And here, the law clearly is a neutral law
4 of general applicability, is it not?

5 MS. GIBSON: No, it's not, because they're
6 specifically saying, if you hold heretical, you know -- I'm
7 going to call it heretical.

8 THE COURT: That's in the arbitration award. The
9 mandate itself is a neutral law of general applicability, is it
10 not?

11 MS. GIBSON: That's certainly something to -- no, I
12 would not say it does. I think the *Roman Catholic Diocese*
13 makes clear that that standard doesn't mean that it -- if it
14 seems to apply to everyone, that it's neutral. The neutrality
15 comes from the hostile statement. That's what -- general
16 applicability --

17 THE COURT: The statements that you're calling hostile
18 are about the exemption, which is part of the arbitrator's
19 award, not part of the mandate.

20 MS. GIBSON: The statements that I'm calling hostile
21 are the statements by the governor and the mayor that say that
22 there's no valid religious exemption, objection to this. That
23 is hostility towards religious views that conflict with the
24 Pope's. He says many, many times over: Because the Pope has
25 said that he's okay with vaccines, I hold the position that

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1 there's no valid religious objection to vaccines.

2 THE COURT: But what the mayor said, with no
3 disrespect intended to the mayor, is not the end of the
4 process. Individual teachers can apply for the religious
5 exemption. If it's denied, there is an appellate review
6 process that the mayor is not a party to, other than in name.

7 MS. GIBSON: Every single one of these people who were
8 denied, when they went -- if they were given, and a Zoom
9 appeal, which I wouldn't really call adequate process, if they
10 were -- every single one, even people who are Buddhists, not
11 Catholic, they mention the Pope as the reason. The DOE
12 mentioned the Pope in every single one of those hearings as the
13 reason the person should be denied. I mean, I don't know how
14 more clear-cut you can get as an Establishment Clause
15 violation. We do not follow, you know -- the Pope, they have
16 wonderful -- and he may be right that this is what god wants
17 and Governor Hochul may be right that this is what god wants
18 and we have to go after people who don't understand what god
19 wants, but that is not the job of the state, and the state has
20 to maintain the strictest level of neutrality, the government
21 does, and we are seeing here hostility towards viewpoints that
22 do not comport with the Pope's on a level that really shocks
23 the conscience, and even in situations --

24 THE COURT: All right. Counsel, you have all of this
25 in your papers. So --

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1 MS. GIBSON: Even in situations where it hasn't been
2 that there's these negative statements on top of the, you know,
3 open hostility on top of limiting religious exemptions to
4 vaccinations, you know, the Eastern District case, court case,
5 *Sherr v. Northport Schools*, that case, well, you know, that's
6 not necessarily controlling, although it was appealed and
7 denied; it did overturn New York State law. So New York used
8 to have a statute that limited, in the very similar fashion to
9 the way that the DOE is applying this, limited the exemption,
10 and in fact, you know, the *Sherr* case made them start over and
11 say, no, you cannot -- do not have to have a certification from
12 clergy, that's unlawful and unconstitutional, you can't be
13 limited --

14 THE COURT: Counsel, I'm going to interrupt you
15 because I told you at the outset we're not here today to argue
16 the merits, the ultimate merits of your case, which is what
17 you're doing. This may be even appropriate next week when you
18 are due for your preliminary injunction. Today we're limited
19 to why are you entitled, on an *ex parte* emergency basis, to the
20 interim relief, and you're repeating all the arguments you've
21 made in your brief. So unless you have something further, I
22 have a trial about to start. I need to hear from the other
23 side too.

24 MS. GIBSON: I do have something further, your Honor.

25 THE COURT: Briefly.

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1 MS. GIBSON: As we discussed, irreparable harm is tied
2 in this case to the likelihood of success, so that is why --

3 THE COURT: Correct.

4 MS. GIBSON: But in any event, once we get past that,
5 even just the mandate itself, facially, without any religious
6 or medical exemption, that mandate is not justified
7 constitutionally. Then we have to, you know -- once you show
8 that plaintiffs are entitled to constitutional protection, then
9 the state has the burden of showing that it was necessary and
10 the least restrictive means, and that is where my expert
11 affidavits come in, very highly regarded public health experts,
12 and they're prepared to --

13 THE COURT: Who speak largely to the due process
14 argument that was at issue in the Eastern District case before
15 Judge Cogan, and ultimately rejected. That's not the gravamen
16 of your complaint here. So we're not going to spend the rest
17 of the morning arguing about other cases.

18 MS. GIBSON: I'm not really familiar with the judge's
19 decision in that case, but I would be happy to read it, but I'm
20 just saying that the burden is on the state to justify that
21 this is the least restrictive means, and I think the fact that
22 this is a non-sterilizing vaccine, that we all recognize can't
23 stop transmission, and the facts of this case --

24 THE COURT: I don't think that that statement is
25 accurate, and that's what your affidavits go to, and again,

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1 we're not here to litigate the merits or the demerits of the
2 vaccine.

3 MS. GIBSON: Okay. So I will stick then only to one
4 more thing, your Honor, which is I think very -- what you're
5 asking me, which is, what other irreparable harm other than
6 constitutional violations are these plaintiffs --

7 THE COURT: Alleged constitutional violations.

8 MS. GIBSON: Sure, yes, your Honor.

9 THE COURT: And no briefing on the issue that I raised
10 with you about whether, since the exemptions were put in place
11 as a result of the collective bargaining process and the
12 arbitrator's award, it's government action; and second, whether
13 there's any waiver, implied or otherwise, of the individual
14 right to challenge the exemptions or whether that standing
15 right belongs with the plaintiff. So that's not something
16 you're going to be able to resolve today because neither side
17 addressed it in your briefing, but it is an issue that Judge
18 Caproni will need to hear about, I would think.

19 MS. GIBSON: Very helpful to know, and I will
20 definitely brief that. At the outset, I will say that your
21 constitutional rights always trump any other kind of
22 arbitration. You cannot make a valid arbitration award or
23 court decision that violates constitutional rights.

24 THE COURT: You can have an arbitration award that
25 says you waive your constitutional rights, but the Supreme

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1 Court has been very clear in *14 Penn Plaza v. Pyett* that you
2 can waive an individual remedy, and that's the point I'm making
3 to you: Is it the individual employees of the DOE who have the
4 right to raise this issue or is it the union? I don't know the
5 answer to that because nothing about this collective bargaining
6 process and, frankly, nothing even about whether these
7 plaintiffs were subject to or members of that union is before
8 the Court right now. So I just don't know the answer to that.

9 MS. GIBSON: I would submit that that can't change
10 their individual rights, your Honor.

11 THE COURT: I heard what you said, but I think there
12 are legal issues about that that you haven't briefed, and
13 frankly, neither did the other side.

14 MS. GIBSON: I would talk about the irreparable harm
15 beyond the constitutional violations. So in the first place,
16 even if you're accepted under this arbitration award, it still
17 doesn't change that the mandate requires you to not enter any
18 school building, so one of the central things we are
19 challenging, accepted or denied, is whether that is a
20 constitutionally permissible burden on people who have
21 religious objections to vaccines. So if you can never enter a
22 school building and you're a teacher, that is why it is
23 relevant whether they are a direct threat to other people,
24 whether it's justified as the least restrictive means to deal
25 with --

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1 THE COURT: Again, that goes to the merits, the
2 ultimate merits, but I do believe, I do believe that there is
3 case law out there that says that while you may have a
4 constitutional right to pursue your chosen profession, you
5 don't have a constitutional right to a specific job.

6 MS. GIBSON: Well, you can't be fired or prohibited
7 from doing your job on the basis of your religious beliefs,
8 though. So that is -- this is a discrimination case. So we're
9 talking about reasons. So --

10 THE COURT: Counsel, you're constantly recasting what
11 your case is about.

12 MS. GIBSON: I'll try to do a better job, your Honor,
13 of being clear. I do think I was very clear in the papers that
14 this is about discrimination and that First Amendment
15 challenges are generally about discrimination, these ones
16 particularly. But irreparable harm beyond not being able to go
17 into the building, there's more. You know, these are teachers.
18 They're living paycheck to paycheck. People are going, you
19 know -- not able to feed their kids in the meantime; they're
20 not able to, you know -- they may lose their homes. They don't
21 have the kind of resources in tow that this is going to be
22 limited to, oh, I can just be paid back later, I'll use my
23 savings. These are teachers in the New York City public school
24 system, many of whom are struggling to get by, and the effect
25 of stripping them of their salaries entirely, their livelihood

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1 and their ability to even, you know, go and do their jobs
2 inside of the schools, is extremely damaging and extremely
3 urgent for them. I have plaintiffs here today who have already
4 suffered extremely, extreme stress, to the point that, you
5 know, they're getting conditions they had before, like Bell's
6 palsy --

7 THE COURT: I understand your arguments, counsel.
8 It's in your papers, and I do appreciate your argument, and I
9 understand what you're saying. I'd like to hear from the other
10 side now, please.

11 MS. MINICUCCI: Good morning, your Honor.

12 THE COURT: Good morning.

13 MS. MINICUCCI: So the DOH, or the Commissioner of
14 Health order, is facially neutral. Within the order, it says
15 that religious exemptions and medical exceptions are permitted,
16 and the arbitration, which was with the UFT, which was then
17 extended to other unions, provides a framework by which people
18 can apply for religious or medical exemptions and an appeals
19 process, where they can be, you know, accepted or denied for
20 their appeals.

21 THE COURT: All right. But counsel, what about the
22 argument made on behalf of the employees that apparently -- and
23 it does seem as though there's some support for this -- the
24 position in the arbitration process is: The Pope says vaccines
25 are okay so certainly if you're a Roman Catholic you can't have

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1 a sincerely held religious belief that the vaccine is not okay.
2 And there's also apparently some indication that you have to
3 belong to an organized religion. Now I disagree with the
4 characterization that it's only Jehovah Witnesses or Christian
5 Scientists because the order says "e.g.," but it does seem to
6 indicate that somebody who's an employee of the DOE and not a
7 member of an organized religion cannot qualify for a religious
8 exemption. So how is that not applying the mandate unequally
9 on the basis of people's religious beliefs?

10 MS. MINICUCCI: So each of those inquiries is an
11 individualized inquiry that has to do with the person's
12 application and what they have said in their application, and
13 then what is said in their appeal. I don't have access to
14 plaintiffs' applications for their religious exemptions, but
15 looking at their affidavits, there really isn't anything
16 particularized about what their religious beliefs have to do
17 with them getting the vaccine. There are a few details about
18 the by-product of abortion, but really, there is no link made
19 between the religious belief and what that sincerely held
20 religious belief is and --

21 THE COURT: I don't think that's a fair
22 characterization, counsel. I don't think that's fair. If you
23 read the affidavits, there are certainly statements by some of
24 these plaintiffs that that is a sincere religious objection to
25 the way the exemptions are being applied.

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1 MS. MINICUCCI: Yes. I understand that, your Honor,
2 but what I'm saying is --

3 THE COURT: And they're being told that because the
4 Pope has apparently said he doesn't have a problem with the
5 vaccine, that at least if you're a Roman Catholic, you can't
6 sincerely hold that belief.

7 MS. MINICUCCI: Okay. Well, that is, again, an
8 individualized inquiry that has to do with the arbitrator who
9 was hearing that appeal.

10 THE COURT: I think that's part of the question: is it
11 being done on an individualized basis or is it being done as an
12 across-the-board, not-narrowly-tailored exemption.

13 MS. MINICUCCI: I don't have that information, your
14 Honor.

15 THE COURT: Who has the burden on that issue?

16 MS. MINICUCCI: I'm not sure. But in any event, the
17 actual order from the Commissioner of Health is neutral, and to
18 the extent that, you know, plaintiffs have exhausted their
19 appeal, they can also file an Article 75 proceeding.

20 Furthermore, we've, you know, already litigated this
21 case, or in the -- not this case, but this order was reviewed
22 by Judge Cogan and the Second Circuit and an appeal was made to
23 the Supreme Court, and that order was upheld.

24 THE COURT: Not on these precise grounds. Those were
25 on the grounds that there's a due process right to control your

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1 own bodily integrity and simply say, I don't believe in the
2 vaccine and I don't want to take it. This complaint is brought
3 on the basis, predominantly -- although there is a challenge to
4 the medical exemption as well, as I understand it, but
5 predominantly on the grounds of religious discrimination, which
6 was not an issue in the case before Judge Cogan.

7 MS. MINICUCCI: That's true, your Honor.

8 And then I don't know, your Honor. Did you want to
9 also hear about the actual process about whether they would be
10 keeping their job or -- because that was in the order, that was
11 what we were asked to brief, so if you had enough in our brief,
12 then I won't.

13 THE COURT: Yes, I think your brief addresses it
14 sufficiently for my purposes today. I will, you know, at the
15 conclusion, give you some thoughts on issues that I see that
16 the parties can decide whether you're going to brief it for
17 Judge Caproni in connection with the hearing on the preliminary
18 injunction next week. Today we're just talking about the
19 temporary restraining order.

20 MS. MINICUCCI: Okay.

21 THE COURT: I raise it because I do believe it goes to
22 the point of irreparable harm, and you did address it in your
23 briefing.

24 MS. MINICUCCI: Okay. So I'll just conclude then by
25 saying that, you know, the irreparable harm, as defined within

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1 our brief, is being -- it will be remedied by money damages to
2 the extent the plaintiffs are successful. The order, the DOH
3 order is lawful. It allows for exemptions as amended on
4 September 28th, and frankly, plaintiffs are now making this
5 application after the mandate is in place, even though they
6 filed their original papers on September 21, and we litigated
7 two other vaccine cases completely, and those cases were
8 appealed. Those appeals were heard and denied, and then they
9 waited almost seven days before filing this.

10 THE COURT: Is the injunction seeking a mandatory
11 injunction or prohibitory injunction?

12 MS. MINICUCCI: I'm not sure, your Honor.

13 THE COURT: Okay. That's another legal issue you all
14 might want to brief.

15 All right. Anything else, counsel?

16 MS. MINICUCCI: No. Thank you, your Honor.

17 THE COURT: All right. As I say, the Court has
18 carefully read all the papers that are before me today, and
19 today, we are here only on plaintiffs' *ex parte* emergency
20 application for a temporary restraining order pending the
21 hearing on their motion for a preliminary injunction, which
22 will take place next week.

23 Plaintiffs are nine employees of the Department of
24 Education who filed this case on September 21st seeking to
25 enjoin New York City's vaccination mandate for all DOE

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1 employees. That mandate was announced on August 23rd. It was
2 originally scheduled to go into effect on September 27th, but
3 due to ensuing litigation, which these plaintiffs apparently
4 did not join, and the collective bargaining process,
5 implementation of that mandate was delayed to the close of the
6 day, I believe, last Friday, October 1st.

7 In the complaint that they filed in this case, at
8 paragraph 7, on September 21st, plaintiffs made the following
9 statement: "Without relief, on or before September 27, 2021,
10 plaintiffs and thousands of other New York City teachers will
11 be harmed irreparably by loss of employment." They then go on
12 to talk about alleged harm to the public at large, which I'm
13 not sure these plaintiffs even have standing to assert. But in
14 any event, the point that I'm making is, on September 21st,
15 plaintiffs themselves affirmatively said that if they didn't
16 get relief by September 27, there would be irreparable harm.

17 No defendant, to the Court's knowledge, was served
18 with the complaint when this case was filed two weeks ago. To
19 date there is still no proof of service on the defendants filed
20 on the docket. In fact, the docket reflects that plaintiffs
21 waited until 3:30 in the morning yesterday to request that
22 summonses be issued for service on each of the defendants, and
23 the Court does not know if the defendants have yet been served
24 with a copy of the complaint.

25 Yesterday morning, October 4th, at approximately

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1 8 a.m., after the mandate went into effect, plaintiffs moved
2 for a temporary restraining order and a preliminary injunction,
3 seeking to halt implementation of the mandate on the grounds of
4 First Amendment violations, and they also appeared to challenge
5 the medical exemption as being too narrow. That was filed
6 around the start of the school day, as I say, after the mandate
7 was already in effect. No explanation was given in the moving
8 papers, as is required under the federal rules, for why the
9 application was made *ex parte*, why no notice was given to the
10 city.

11 Now turning to the merits, the Court does note that
12 the mandate as issued contained no exemption for religious or
13 medical reasons, and it's the Court's understanding that there
14 is no testing option for teachers under that mandate. However,
15 after the mandate was issued, one of the unions for certain DOE
16 employees filed a grievance on behalf of its members, and as
17 part of that bargaining process, a neutral arbitrator was put
18 in place and ruled on the issue.

19 On September 10th, that arbitrator recognized a
20 medical and a religious exemption from the mandate. The scope
21 of those exemptions is set out in pages 7 through 9 of the
22 arbitrator's decision. And the arbitrator also set out a
23 process for applying for the exemption and for appealing from
24 any rulings and also set forth a remedy. Specifically, the
25 arbitrator ruled that employees who have not requested an

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1 exemption or who have had their requests denied and do not
2 receive at least one dose of the COVID-19 vaccine may be placed
3 on administrative leave as of September 28. And as I say, that
4 deadline was later extended to October 1st, last Friday. Those
5 employees will be put on leave. They don't get a salary, but
6 they are provided with full benefits until next September, and
7 there is apparently some process in place to try to apply to
8 extend that leave.

9 I just want to say a bit, for the record, about the
10 plaintiffs.

11 All of the plaintiffs, as I understand it, are
12 employees of the Department of Education, but as I noted in my
13 colloquy with counsel, some of those plaintiffs still have
14 appeals pending, some of those plaintiffs didn't even bother to
15 apply at all for the exemption, but at least one of those
16 plaintiffs has had -- and maybe more -- has had the appeal from
17 their application denied and therefore are subject to being
18 placed, and perhaps have been placed, on administrative leave.
19 One of the plaintiffs does assert an entitlement to a medical
20 exemption, and so there is a plaintiff with standing to address
21 that issue. But I do note that that plaintiff has not
22 exhausted the process for the application because the record,
23 or at least her affidavit seems to reflect that she was told to
24 submit additional information and has not done that. So there
25 is a question about the ripeness of that issue right now.

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1 I'm going to turn to the merits of the application
2 that's before me today. And I start with the proposition that
3 injunctive relief is an extraordinary remedy, never awarded as
4 of right. I'll also note that the law draws a distinction
5 between mandatory injunctions, which alter the status quo, and
6 prohibitory injunctions, which maintain it. I asked counsel
7 about this. The papers do not address this issue at all. But
8 the Court sees an issue about the fact that given that the
9 injunction had already gone into effect by the time this
10 application for injunctive relief was filed, there's a question
11 about whether the relief sought is a mandatory injunction or a
12 prohibitory injunction that the parties have not fully and
13 fairly addressed.

14 There is some suggestion that in determining whether
15 an injunction is mandatory or prohibitory, the Court should
16 look to the last -- and this is a quote -- "the last actual
17 peaceable, uncontested status which preceded the pending
18 controversy." That would certainly suggest that perhaps the
19 status quo is the set of circumstances that were in effect
20 before there was a mandate. On the other hand, since the
21 plaintiffs waited until after the mandate went into effect,
22 there is case law that says if a plaintiff waits to contest the
23 change in circumstance, the relevant status quo may also
24 change. And I am referring to a case called *Williamson v.*
25 *Maciol*, 839 F. App'x 633. That's a 2001 case.

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1 Turning to the elements of an application for a
2 temporary restraining order -- and the elements are the same
3 with respect to both an application for a temporary restraining
4 order and ultimately for a preliminary injunction -- in order
5 to prevail on that motion, a plaintiff must demonstrate: (1)
6 irreparable harm if an injunction is not entered; (2) a
7 likelihood of success on the merits or sufficiently serious
8 questions as to the merits, plus a balance of hardships that
9 tips decidedly in the plaintiff's favor; (3) a balance of
10 hardships that tips in the plaintiff's favor regardless of the
11 likelihood of success; and (4) that an injunction is in the
12 public's interest.

13 I'll begin with the requirement for irreparable harm.
14 The law is well settled that irreparable harm is the single
15 most important prerequisite for issuance of injunctive relief.
16 And I would cite you to any number of cases that stand for that
17 proposition. I don't think it's controversial, frankly. I'll
18 refer you to the case of *Faiveley Transp. Malmo AB v. Wabtec*
19 *Corp.*, 559 F.3d 110, 118 (2d Cir. 2009). But you can also look
20 at Wright and Miller's *Federal Practice and Procedures*,
21 Section 2951, Third Edition.

22 The case of *Jolly v. Coughlin*, which was referred to
23 by counsel for the plaintiffs, reported at 76 F.3d 468, 482 (2d
24 Cir. 1996), did say that a court will presume the existence of
25 irreparable harm when the plaintiff alleges a violation of a

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1 constitutional right. However, as I discussed with counsel, if
2 a court finds it unlikely that a plaintiff will succeed on the
3 merits of the constitutional claim, the argument that he's
4 entitled to a presumption of irreparable harm based on an
5 alleged constitutional violation is without merit. I'll
6 explain in a few minutes that I cannot find on the record
7 before me that plaintiffs are likely to succeed on the merits
8 of their claim. I'm not saying they won't; I'm saying on the
9 record before me, plaintiffs have not made an adequate showing
10 to entitle them to a temporary restraining order. As a result,
11 no presumption of irreparable harm attaches here. Instead, we
12 look to the actual harm the plaintiff is asserting.

13 As I've said, as a result of non-compliance with the
14 mandate, plaintiffs are placed on unpaid leave with benefits,
15 including health care benefits. If plaintiffs ultimately
16 prevail on their constitutional challenge, the alleged injuries
17 are entirely compensable by money damages. I'll just note as
18 well that the Court finds this case is different than the harm
19 in the health care workers case. I'll also note that the
20 Second Circuit -- I think I said this a few minutes ago -- the
21 Second Circuit has scheduled argument for I believe
22 October 14th in two cases involving the vaccine mandate.

23 I would note, too, that plaintiffs' delay in seeking
24 relief on a mandate that was announced in late August, and
25 where they themselves said they needed to get relief by

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1 September 27th and yet waited until after the mandate went into
2 effect to bring on this motion, undercuts their burden to show
3 irreparable harm.

4 The Court is also mindful of the potential harm --
5 actually, the very real harm -- that could flow to the city
6 were I to grant temporary injunctive relief. If I were to
7 grant injunctive relief today pending the hearing next week,
8 there could be an enormous disruption in the conduct of school
9 for thousands of New York City schoolchildren. The plaintiffs
10 will have a full opportunity to be heard on an appropriately
11 developed record next week when they have a hearing before
12 Judge Caproni.

13 In addition, the Court cannot ignore the harm that
14 could take place if the children in the school system were
15 exposed to the risks of COVID, which is the very harm that the
16 mandate is intended to prevent. If that harm happens, it's a
17 harm that cannot be undone.

18 Turning to the likelihood of success on the merits,
19 the Court also finds, as I say, that on the record before me
20 now, plaintiffs have not met the burden of showing likelihood
21 of success on the merits. The mandate on its face is neutral
22 and it is generally applicable, and that's what the Supreme
23 Court says is required. Now the Court does acknowledge that
24 the exemptions arguably might raise serious issues in terms of
25 how they are being applied and, most particularly, since that's

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1 the argument that was developed in the record before me, the
2 religious exemption may well raise substantial constitutional
3 issues. The Court notes that the Supreme Court said in
4 *Masterpiece Cakeshop v. Colorado CR Commission*, "The
5 government, if it is to respect the Constitution's guarantee of
6 free exercise, cannot impose regulations that are hostile to
7 the religious beliefs of affected citizens and cannot act in a
8 manner that passes judgment upon, or presupposes the
9 illegitimacy of, religious beliefs and practices."

10 Justice Ginsburg, although it is a dissenting opinion,
11 in *Trinity Lutheran v. Comer*, made the observation that faith,
12 they believed, was a personal matter entirely between an
13 individual and his god. Religion was best served when sects
14 reached out on the basis of their tenets alone, unsullied by
15 outside forces, allowing adherents to come to their faith
16 voluntarily. And similarly, in *Engel v. Vitale*, the Supreme
17 Court noted religion is "too personal, too sacred, too holy to
18 permit its 'unhallowed perversion' by a civil magistrate."

19 And plaintiffs do correctly point to the 1987 Eastern
20 District case that dealt with this precise issue and held that
21 the New York statute's limitation of a religious exemption from
22 vaccinations to those who are members of recognized religious
23 organizations is blatantly violative of a First Amendment
24 guarantee, and that's *Sherr v. Northport*. And that case does
25 not appear to have been appealed.

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1 But as I said earlier, the religious exemption that's
2 at issue here was put in place by a neutral arbitration in
3 response to a labor grievance that was brought by certain other
4 parties not before the Court pursuant to a collective
5 bargaining agreement, as the Court understands it. That
6 collective bargaining agreement is apparently a public-private
7 agreement, and again, it is not before the Court, but there is
8 a significant legal question that neither side has addressed
9 about whether the exemption is issued as part of a government
10 action and can therefore be the basis for a constitutional
11 challenge. Also not addressed by the parties is: does the
12 collective bargaining agreement preempt, in effect, claims by
13 individual plaintiffs and instead require that any claim has to
14 be brought by the union itself. The Court honestly doesn't
15 know the answer to that because I don't have any of the
16 documents in front of me. But that is a significant issue that
17 goes to the ultimate merits of the case.

18 As I say, there may well be questions, serious
19 questions, about the impact on the plaintiffs' constitutional
20 rights here, but on the record before me, the Court cannot find
21 that plaintiffs have met their burden of showing a substantial
22 likelihood of success on the merits in light of these
23 questions.

24 The final element that plaintiffs need to carry the
25 burden on is that the balance of equities weighs in their

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1 favor. Where the government is the opposing party, the Court
2 notes that the final two factors in the temporary restraining
3 order analysis -- the balance of the equities and the public
4 interest -- merge. Here, I do find that the balance tips
5 against the plaintiffs because of their delay in bringing this
6 application. Plaintiffs knew that the mandate would go into
7 effect over a month ago, and they waited until after the
8 mandate was already in effect to take action. Moreover, there
9 can't seriously be a dispute that there is a compelling
10 government interest that is served by the mandate.

11 Numerous courts have held that the government's
12 interest in minimizing the spread of a deadly infectious
13 disease is a compelling state interest. I note too again, as I
14 said a moment ago, there are two pending Second Circuit cases
15 that could serve to moot the issues in this case as well.
16 Given the imminence of a decision in those cases, the Court
17 does not believe it's appropriate to entertain or grant at this
18 point a motion for extraordinary injunctive relief sought on an
19 *ex parte* basis.

20 So for those reasons, the plaintiffs' application for
21 a temporary restraining order is denied.

22 As I said at the outset, Judge Caproni has scheduled a
23 hearing to take place next Tuesday. If there's not an order
24 yet in place, we'll take care of making sure that one does get
25 entered, but I've mentioned to you some of the issues that I

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1 think need to be addressed more fully in order for plaintiffs
2 to meet their burden.

3 That is the Court's ruling. It is so ordered. And we
4 are adjourned.

5 MS. GIBSON: Thank you, your Honor.

6 THE COURT: Thank you.

7 MS. MINICUCCI: Thank you, your Honor.

8 o0o